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Вештачењето и „еднаквоста на оружјата“

"justice must not only be done: it must also be seen to be done"

Delcourt v. Belgium,

Judgment, 17 January 1970

Abstract

The principle of equality of arms is an essential element of the fair trial concept within the meaning of Article 6 of the ECHR and minimum threshold for impartial and consistent proceeding. Each party must be afforded a reasonable opportunity to present its case under conditions that do not place him at a disadvantage vis-à-vis his opponent or opponents and every arguments or observations intended to advise or influence a court, should be communicated to both parties. The ECtHR have accepted a two-step approach for establishing a violation of equality of arms. Starting point is to establish actual lack of procedural or institutional balance and than to assess the consequences of the inequality toward the fairness of the whole proceedings.

As stated in the ECtHR's case-law, it is easily understandable that doubts should arise, especially in the mind of an accused, as to the neutrality of an expert when it was his/her report that in fact prompted the bringing of a prosecution. Such apprehensions may have a certain importance, but are not decisive. What is decisive is whether the doubts raised by appearances can be held objectively justified. There is a violation of equality of arms principle

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when appearances suggest that the opinion submitted by the expert was more akin to evidence against the applicant used by the prosecuting authorities rather than a “neutral” and “independent” expert opinion.

The purpose of this article is to elaborate the real position of the experts and expert witnesses in the criminal proceedings in the context of equality of arms and furthermore to show the inconsistencies in the application of the provisions of these types of evidences in practice. We'll make an effort to show that, generally in practice, the application of these provisions is either misused or their application has not been approved by the competent authorities. Also we'll try to indicate that expert witnesses are not reserved only for the defense, but they can be equally used by the prosecution as well.

Keywords: *equality of arms; balances of rights; fair trial; contradictory; expert opinion; alternative expert examination;*

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